Petition

81-779

Docket No.

Office - Supreme Court, U.S.
FILED
OCT 23 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1981

JESTON HOLLAND,

Petitioner

V.

SEA-LAND SERVICE, INC.,

Respondent

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

C. Arthur Rutter, Jr.
John H. Klein
BREIT, RUTTER & MONTAGNA
720 Atlantic National Bank Building
Norfolk, Virginia 23510
804-622-5000
Attorneys for Petitioner
Jeston Holland

QUESTIONS PRESENTED

I. Where a longshoreman sues as a third party a defendant which is also an "employer" under the Occupational Safety and Health Administration Regulations for Longshoring, do those regulations establish the applicable standard of care for that third party defendant?

II. Does maritime law apply to a negligence suit by a longshoreman who was injured on land within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act?

INDEX

	Page
Opinions Delivered in the Courts Below.	1
Jurisdiction.	4
Questions Presented	5
Statutory Provisions	5
Statement of the Case	6
Reasons Relied on for Allowance of the Writ	10
(1) The Court of Appeals has rendered a decision in conflict with the decision of other Courts of Appeals on the same matter.	10
(2) The Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.	19
(3) The Court of Appeals decision is contrary to the decisions of this Court. .	34
Conclusion.	35

TABLE OF CITATIONS

Cases	Page
Arthur v. Flota Mercante Gran Centro American, S.A. 487 F.2d 561 (5th Cir. 1973).	16
Bachner v. Rich, 554 P.2d 430 (Alas. 1976)	15
Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979).	17
Boleski v. American Export Lines, 385 F.2d 69 (4th Cir. 1967). . .	15
Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977).	17
Buhler v. Marriott Hotels Inc., 390 F.Supp. 999 (E.D. La. 1974).	15
Chavis v. Finnlines Ltd. O/Y 576 F.2d 1072 (4th Cir. 1978). . . .	16,17
Disabatino Bros. v. Baio, 366 A.2d 508 (Del. 1976)	15
Dunn v. Brimer, 259(Ark.) 855, 537 S.W. 2d 164	15
Executive Jet Aviation Inc. v. City of Cleveland, 409 U.S. 249, (1972)	25, 31
Gay v. Ocean Transport and Trading Ltd., 546 F.2d 1233 (5th Cir. 1977)	17

Johnson v. A/S Ivaráins Rederi, 613 F.2d 334 (1st Cir. 1980). 18

Knight v. Burns, Kirkley and Wi-liams Constr. Co., 331 S.2d 651 (Ala. 1976). 15

Lacaze v. Olendorff, 526 F.2d 1213 (5th Cir. 1976). 14

Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977). 27

Parker v. South Louisiana Contractors Inc., 537 F.21 113 (5th Cir. 1976) 30

P.C. Peiffer and Co., v. Ford, 444 U.S. 69 (1979) 34, 34,27,29

Provenza v. American Export Lines, 324 F.2d 660 (4th Cir. 1963) cert. denied, 376 U.S. 952 (1964) 15,16

Schroeder v. C.S. Braun & Co, 502 F.2d 235 (7th Cir. 1974) . . 14

Venable v. A/S Det Forenede Dampskibsselskab, 399 F.2d 347 (4th Cir. 1968). 16

Victory Carriers Inc. v. Law, 404 U.S. 202 (1971) 23, 26

Voris v. Eikel, 346 U.S. 328 (1953) 33

White v. Johns--Manville Corp. No. 79-1854 (4th Cir. 1981). 31

Other

29 U.S.C. §1254(1). 4
§651. 10
33 U.S.C. §933(a) 5
§902(3) 24
§903. 24

46 U.S.C. §740. 26

29 C.F.R. §1918.2 . . . . . .17, 18

29 C.F.R. §1918.3(c). 12
§1919.85(d) 3,8, 13

S.Rep. No. 92-1125-21 21

IN THE
SUPREME COURT OF THE
UNITED STATES

JESTON HOLLAND,

Petitioner,

v.

SEA-LAND SERVICE, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINIONS DELIVERED IN THE COURTS BELOW:

Petitioner Jeston Holland, a longshoreman, who was injured while operating a hustler pulling a container on a chassis, suffered personal injuries on April 18, 1979 when the hustler and its load tipped over as petitioner turned onto the pier. The accident occurred while petitioner was employed by Nacerima Operating Company to participate in cargo operations at the

terminal operated by Sea-Land Service Inc. at Portsmouth, Virginia.

Petitioner was paid workman's compensation benefits by his employer, Nacerima, on account of the accident in question. These benefits were paid pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et. seq. Petitioner also filed suit against Sea-Land for negligence as permitted by §33 of the Longshoremen's Act, 33 U.S.C. §933. The matter was tried in the United States District Court for the Eastern District of Virginia before the Honorable Richard B. Kellam, District Judge, with a jury, on July 9, 1980. The jury returned the verdict in favor of the petitioner against the respondent. The trial court instructed the jury to apply the maritime law rule of compara-

tive negligence rather than the Virginia rule of contributory negligence. The trial court then reduced the petitioner's damages by the amount of the petitioner's contributory negligence as found by the jury.

Petitioner appealed to the Court of Appeals for the Fourth Circuit because of the trial court's refusal to instruct the jury on the respondent's duty based on the provisions of the Occupational Safety and Health Administration's Regulations for Longshoring, specifically 29 C.F.R. 1918.85(d). The Court of Appeals for the Fourth Circuit reversed the trial court's judgment and remanded the case for entry of judgment in respondent's favor on the ground that maritime law was not applicable to the accident in question, the Virginia rule of contri-

butory negligence was therefore applicable, and the jury had found contributory negligence. The Court of Appeals therefore concluded that petitioner was barred from any recovery under Virginia law and judgment must be entered for respondent. The Court of Appeals decision is dated July 24, 1981. All pertinent opinions are appended hereto.

JURISDICTION

The date of the decision of the United States Court of Appeals for the Fourth Circuit sought to be reviewed is July 24, 1981. The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Where a longshoreman sues as a third party a defendant which is also an "employer" under the Occupational Safety and Health Administration Regulations for Longshoring, do those regulations establish the applicable standard of care for that third party defendant?

II. Does maritime law apply to a negligence suit by a longshoreman who was injured on land within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act?

STATUTORY PROVISIONS

33 U.S.C. §933(a):

> If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or

persons in his employ
is liable in damages
he need not elect
whether to receive
such compensation or
to recover damages
against such third
person.

STATEMENT OF THE CASE

Petitioner Jeston Holland was employed as a longshoreman by Nacerima Operating Company which was contracted to perform longshoring operations at the terminal of Sea-Land Service Inc. at Portsmouth, Virginia. During the course of his employment on April 18, 1979 petitioner suffered personal injuries when a container loaded on a chassis pulled by petitioner's "hustler" shifted as petitioner turned onto the pier. The shift in the load flipped the "hustler" and chassis onto its side, throwing petitioner about in the hustler's cab. Petitioner sued

Sea-Land as the operator of the terminal at which he was working. Specifically petitioner contended that Sea-Land had negligently inspected the container in question, had failed to properly fasten the container to the chassis, and had failed to warn him of the defective and dangerous condition.

Petitioner received workman's compensation payments from his employer, Nacerima, pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et. seq. He missed time from work and incurred medical expenses due to the accident in question. Petitioner sued Sea-Land, the operator of the terminal, as a negligent third party. Petitioner alleged in the trial court that the accident was subject to maritime law. The trial court agreed and instructed the jury

to apply the maritime rule of comparative negligence rather than the Virginia rule of contributory negligence. The trial court refused to instruct the jury as requested by petitioner based on the Occupational Safety and Health Administration Regulations for Longshoring, which require in pertinent part that an "employer" shall inspect outbound containers before loading for any defects in fittings which would render handling and loading of the container unsafe. 29 C.F.R. §1918.85(d).

Nevertheless, the jury returned a verdict in favor of the petitioner, concluding in special interrogatories that Sea-Land was guilty of negligence which proximately caused petitioner's injuries, that petitioner is guilty of contributory negligence, and that

petitioner's damages were $700.00. The trial court entered judgment on the verdict, reducing the damages by the 75% contributory negligence of the petitioner, to the sum of $125.00.

Petitioner appealed to the Court of Appeals for the Fourth Circuit based on the trial court's refusal to instruct the jury based on the OSHA Regulations which were applicable to Sea-Land as an "employer." The Court of Appeals reversed the trial court's judgment in favor of petitioner and remanded for entry of judgment in favor of Sea-Land.

Jurisdiction in the court of first instance, the United States District Court for the Eastern District of Virginia, existed by virtue of 28 U.S.C. §1332 on the grounds of

diversity of citizenship and the amount in controversy.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The Court of Appeals has rendered a decision in conflict with the decision of other Courts of Appeals on the same matter.

The question of whether the OSHA Regulations for Longshoring establish the standard of care for a negligent third party has been answered in the negative by the Court of Appeals for the Fourth Circuit, but the Ninth Circuit and First Circuit have reached the opposite conclusion. The Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et. seq. was passed to provide American workers with "safe and healthful working conditions." OSHA was designed to prevent work

related injuries and illnesses by requiring employers to comply with detailed safety and health standards promulgated by the Secretary of Labor. As §4(b)(4) of OSHA provides:

> "Nothing in this Act shall be construed to supersede or in any manner effect any workman's compensation law or to enlarge or diminish or affect in any other matter, the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of the employees arising out of, or in the course of employment."

Jeston Holland brought this action against Sea-Land Service Inc. as the owner and operator of a marine terminal and not as the owner of a vessel. The petitioner's contention is that Sea-Land as owner and operator of a major container moving facility and as

an "employer" involved in "longshoring operations" must comply with the relevant OSHA Regulations. The regulations define "employer" in 29 C.F.R. §1918.3(c) as:

> "...an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments as defined herein...(i) the term "longshoring operations" means the loading, unloading, moving, or handling of cargo, ships stores, gear, etc., into, in, on, or out of any vessel on the navigable waters of the United States. (j) the term "related employments" means any employment performed as an incident to, in conjunction with longshoring operations including, but not restricted to, securing cargo, rigging, and employment as a porter, checker, or watchman."

The evidence at trial clearly establishes that Sea-Land Service is an employer as defined in the Regulations.

As an employer under the Regulations, Sea-Land is required by the Regulations to make sure that:

> "All outbound containers shall be inspected before loading for any visible defects in structural members and fittings, which would render unsafe their handling and loading. To the extent it is practical, inbound containers shall be similarly inspected before discharge. Any outbound container found to have such a defect shall not be loaded unless the defect is first corrected .... ." 29 C.F.R. §1918.85(d).

A violation of this Regulation was the proximate cause of the injuries to petitioner. Accordingly, if the jury had been properly instructed as to the duty imposed on Sea-Land by the applicable Regulations, it would have been clear to the jury that petitioner was not contributorily negligent. Since the jury found significant contributory negligence

on the part of petitioner, petitioner's damages were significantly reduced in the trial court. Petitioner was obviously prejudiced by the trial court's refusal to instruct based on OSHA Regulations because the jury could not properly determine what duties were required of the petitioner and of the defendant at the time of the accident without knowing the applicable regulation.

The majority of jurisdictions that have considered the issue have concluded that OSHA standards may be admitted into evidence in determining the standard of care applicable to a defendant. See Lacaze v. Olendorff, 526 F.2d 1213, 1216 (5th Cir. 1976); Schroeder v. S.F. Braun & Co., 502 F.2d 235, 243 (7th Cir. 1974); Buhler

v. Marriott Hotels, Inc., 390 F.Supp. 999, 1000 (E.D. La. 1974); Knight v. Burns, Kirkley & Williams Construction Co., 331 S.2d 651, 654 (Ala. 1976); Bachner v. Rich, 554 P.2d 430, 440-441 (Alas. 1976); Dunn v. Brimer, 259 Ark. 855, 537 S.W.2d 164, 1966 (Ark. 1976). Disabatino Bros. v. Baio, 366 A.2d 508, 511 (Del. 1976).

Prior to the 1972 Amendments to the Longshoremen's Act, the Court of Appeals for the Fourth Circuit held that OSHA Regulations were admisible to establish the standard of care of a vessel owner being sued as a third party by a longshoreman. Provenza v. American Export Lines, 324 F.2d 660 (4th Cir. 1963), cert. denied, 376 U.S. 952 (1964); Boleski v. American Export Lines, 385 F.2d 69 (4th Cir. 1967; Venable v. A/S Det Forenede

Dampskibsselskab, 399 F.2d 347 (4th Cir. 1968). However, after the 1972 Amendments to the Longshoremen's Act, the Fourth Circuit concluded that the OSHA Regulations for longshoring do not apply to shipowners and do not establish the shipowners standard of care. Chavis v. Finnlines, Ltd., O/Y, 576 F.2d 1072 (4th Cir. 1978). The Chavis court concluded that Provenza and Venable were no longer good law following the 1972 Amendments which relieved a shipowner of liability to longshoremen for unseaworthiness. The Fifth Circuit, which had previously held the OSHA Regulations applicable to shipowners in Arthur v. Flota Mercante Gran Centro Americano S.A., 487 F.2d 561 (5th Cir. 1973), reached the same conclusion following the 1972 Amendments. Gay v. Ocean Trans-

port and Trading, Ltd., 546 F.2d 1233 (5th Cir. 1977); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331 (5th Cir. 1977). However, the Court of Appeals for the Ninth Circuit in Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979), specifically disagreed with the Chavis decision and in strong language reiterated that the Regulations for Longshoring can and do establish the standard of care for the shipowner. In particular, the Ninth Circuit focused on the language of §1918.2 of the Regulations for Longshoring, which reads:

> "It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents, or masters of vessels, unless such persons are acting as employers, nor is it

> the intent of these regulations to relieve such owners, operators, agents, or masters of vessels from responsibilities or duties now placed upon them by law, regulation, or custom." 29 C.F.R. §1918.2

Accordingly, it is clear that the regulations do not relieve owners, operators, agents, or masters, from responsibilities or duties placed upon them by law, regulation, or custom prior to the enactment of the 1972 Amendments.

The Court of Appeals for the First Circuit in Johnson v. A/S Ivarains Rederi, 613 F.2d 334 (1st Cir. 1980), also concluded that following the 1972 Amendments the OSHA Regulations would continue to apply to all parties and may define the appropriate standard of care.

This is consistent with the intent of Congress as expressed in the legislative history to the 1972 Amendments and is consistent with the Regulations themselves.

In view of the inconsistent decisions from the First Circuit, Fourth Circuit, Fifth Circuit, and Ninth Circuit Courts of Appeals as to the application of the regulations for longshoring in longshoremen's third party suits, this court should grant certiorari to the instant matter in order to review the Fourth Circuit's decision.

(2) The Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

Congress, when it amended the Longshoremen's Act in 1972, intended

that legal questions arising under the negligence action against third parties should be determined as a matter of Federal law. Congress also desired that the negligence remedy be applied uniformly in the various courts.

> "Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the Admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the Admiralty rule which precludes the defense of "assumption of risk" in

> an action by an injured employee shall also be applicable." S. Rep. No. 92-1125, 92d Cong., 2d Sess.

The Congressional intention that uniformity be required as a matter of Federal law should lead this Court to establish a national rule as to the application of OSHA Regulations for longshoring in third party suits by longshoremen.

Here Sea-Land has been sued not as a shipowner but as the operator of a maritime terminal facility. As such, Sea-Land clearly has employees engaged in maritime employment within the meaning of the Longshoremen's Act. Sea-Land is, in short, an employer under the Longshoremen's Act. As such, Sea-Land is subject to the OSHA Regulations for longshoring. Petitioner further contends that even if Sea-Land

were only a shipowner, the Regulations would be applicable. Sea-Land here was negligent in the handling of the container in question. The jury agreed, at least in part, because it returned its verdict in favor of petitioner. The jury however did not have before it a correct instruction of Sea-Land's responsiblity as an "employer" to whom the regulations for longshoring were applicable. This Court should grant certiorari to review the Fourth Circuit's decision which did not disturb the trial court's refusal to instruct on the regulations for longshoring.

In addition, the Fourth Circuit reversed the trial court's decision to apply comparative negligence to the petitioner's suit. The trial court concluded that since petitioner was a longshoreman and was engaged in loading

a vessel that he was engaged in maritime employment. Thus the trial court found maritime law applicable to the accident in question and applied the maritime rule of comparative negligence rather than the Virginia rule of contributory negligence as a bar to a plaintiff's recovery.

The Court of Appeals concluded that since the accident occurred on the pier there was no admiralty jurisdiction. This ruling presents a question which should be reviewed by this Court to establish a uniform national interpretation. This Court previously decided that admiralty jurisdiction did not extend to an accident occurring on the pier to a longshoreman operating a stevedore company's forklift. Victory Carriers Inc. v. Law, 404 U.S. 202 (1971).

However, after that decision, Congress amended the Longshoremen's Act to provide compensation for an injury "occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C. §903. The amendments defined "employee" under the Longshoremen's Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations and any harbor-worker including a ship repairman, shipbuilder and shipbreaker... ." 33 U.S.C. §902(3). Thus, the 1972 Amendments created a status test--"engaged in maritime

employment"--and a situs test-- navigable waters of the United States" as broadly defined. Injured workers meeting those tests are covered under the amended act; they are engaged in maritime employment on the navigable waters of the United States.

The result then is that Congress has extended the traditional admiralty jurisdiction of the United States. Historically admiralty or maritime jurisdiction has been determined by the locality of the accident. Accidents over navigable waters came within the jurisdiction of admiralty. This Court established that a tort was cognizable in admiralty when the wrong occurred on navigable waters and bore a significant relationship to maritime activity. Executive Jet Aviation Inc. v. City of Cleveland, 409 U.S. 249 (1972).

There are however exceptions to this focus on locality. The Admiralty Extension Act, 46 U.S.C. §740, specifically provides that admiralty and maritime jurisdiction extends to include cases of damage caused by a vessel on navigable water notwithstanding that such damage is done or consumated on land. The Longshoremen's Act is a second specific encroachment upon the historical boundary line of admiralty. See Victory Carriers v. Law, 404 U.S. at 207-209. Therefore, it is clear that Congress may make specific inroads, modifications, or exceptions to the general rule that admiralty jurisdiction is determined by the locality of the accident. Petitioner submits that Congress has in fact so acted in the 1972 Amendments to the Longshoremen's Act.

This Court has construed the amended Longshoremen's Act to focus on occupations, not geography. In Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977), this Court recognized that one of Congress' primary motivations for extending coverage shoreward was the recognition that modern cargo handling techniques had moved much of the longshoreman's work off the vessel and onto land. In fact, the court recognized the container as the modern substitute for the hold of the vessel. Id. at 270.

In P.C. Peiffer Co. Inc. v. Ford, 444 U.S. 69 (1979), this Court recognized that maritime employment is an occupational rather than a geographic concept. Thus, the Longshoremen's Act uses the phrase "longshoremen" as one example of workers who engage in

maritime employment no matter where they do their job. Id. at 78.

The 1972 Amendments involved more than just workmen's compensation jurisdiction however. The amendments removed a longshoreman's right to sue a vessel owner for unseaworthiness, but continued his right to sue third parties, including shipowners, for negligence. Congress specifically intended, as set forth in the Committee report above, that such negligence actions against third parties apply a "uniform" law, specifically including the admiralty concept of comparative negligence rather than the common law rule as to contributory negligence.

It is thus clear form the Committee reports that Congress intends that all "longshoremen"--all employees covered by the Longshoremen's Act as

amended--should have the same rights against third parties. The only uniform law available which will provide that result is admiralty law. If the various State laws are applied in third party suits by longshoremen, there will be fifty different laws applicable to such suits, a result directly contrary to express Congressional intent.

Based upon the Committee reports, it is appropriate to view the 1972 Amendments as having made admiralty law applicable to third party suits by covered longshoremen. That is precisely the approach taken by District Judge Kellam in the instant matter. Judge Kellam concluded that in light of this Court's Ford decision, maritime law applied to a third party suit by a longshoreman injured while operating a

hustler, where the container would be loaded onto the vessel. Judge Kellam's decision was reversed by the Court of Appeals for the Fourth Circuit because that court concluded that the 1972 Amendments had not extended admiralty jurisdiction as to third party suits. The Fourth Circuit relied on Parker v. South Louisiana Contractor Inc., 537 F.2d 113 (5th Cir. 1976). Parker however totally ignored the legislative history and Congressional intent that the negligence action available to all longshoremen be uniformed in application and specifically apply comparative negligence rather than State rules as to contributory negligence.

Interestingly, the Fourth Circuit has also reached a result inconsistent with its own Holland decision in the recent case of White v. Johns--Manville

Corporation, No. 79-1854 (4th Cir. dec. October 5, 1981). There, the Fourth Circuit found admiralty jurisdiction over personal injury suits by shipyard workers against the manufacturers of asbestos insulation materials. The Fourth Circuit wrote:

> "In the present case, the plaintiff employees alleged in their complaint that they had installed asbestos insulation materials during ship construction and repair in the course of their employment with Newport News. Their work was performed at both the shipyard and dry dock areas as well as aboard the vessels while they were located on navigable waters. Thus, the allegations would meet the locality test of Executive Jet." (White slip opinion at 13).

That reasoning is identical to the reasoning of Judge Kellam in his Holland opinion. How the Fourth Circuit could reverse Judge Kellam in Holland and then follow his reasoning in White

and apply admiralty law to ship repairmen who worked on land is indeed an intriguing question.

This area of the law requires a decision by this Court. With the shoreward expension of the Longshoremen's Act in the 1972 Amendments, many workmen receive Longshoremen's Act compensation for pierside accidents. These workers are entitled to prosecute actions against negligent third parties. These workers are entitled to a uniform Federal negligence action, applied similarly throughout the country, with the doctrine of comparative negligence specifically applicable. Yet if the Fourth Circuit decision stands, recipients of Longshoremen's Act compensation in the Fourth Circuit will <u>not</u> have a uniform remedy and will <u>not</u> have the benefit

of comparative negligence. Rather, they will be barred from suit if there exists any contributory negligence at all, no matter how slight, under the Virginia rule that contributory negligence bars a plaintiff's recovery. This harsh and incongruous result, this inappropriate discrimination against workmen injured in the Fourth Circuit geographical area, is an improper construction of an act designed to benefit injured employees and their families. Voris v. Eikel, 346 U.S. 328 (1953). Therefore, this Court should grant certiorari to review the Fourth Circuit's decision which reversed Judge Kellam's application of maritime law and the rule of comparative negligence.

(3) The Court of Appeals decision is contrary to the decisions of this

Court.

The trial court relied upon this Court's decision in P.C. Peiffer Co. Inc. v. Ford, supra., in deciding that maritime law was applicable to this action. As set forth above, petitioner contends that Congress modified traditional admiralty jurisdiction by the 1972 Amendments to the Longshoremen's Act. Since petitioner clearly is covered by the Longshcremen's Act as amended, he is entitled to the workman's compensation payments provided therein and he is further entitled to the rights and remedies against third parties as set forth in that Act and explained in the Committee reports. That right to sue third parties specifically includes the application of the maritime rule of comparative negligence. Accordingly, uniform

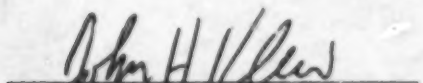
Federal law--maritime law--must apply to this action not Virginia state law. To the extent that the Court of Appeals decision permits State law to govern this action and applies contributory negligence as a bar to plaintiff's recovery, the Court of Appeals decision is inconsistent with this Court's decision in Ford. The petition for certiorari should be granted to review the Court of Appeals decision and bring it into conformity with this Court's prior decision regarding the jurisdiction of the Longshoremen's Act.

CONCLUSION

The decision in this matter of the Court of Appeals for the Fourth Circuit improperly applies the Longshoremen's Act to deny application of the maritime law rule of comparative negligence and improperly failed to

require the District Court to instruct based upon the OSHA Regulations for longshoring specifically made applicable to employers such as respondent Sea-Land. Wherefore, petitioner prays that a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit Court of Appeals herein.

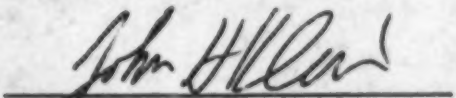
Respectfully submitted,
C. Arthur Rutter, Jr.
John H. Klein,



Attorneys for
Petitioner.

CERTIFICATE OF SERVICE

I John H. Klein certify that on the 22nd day of October, 1981, 40 copies of this Petition for Certiorari were mailed or delivered to the Clerk, U.S. Supreme Court, and 3 copies were mailed to John Crumpler, Jr., counsel for the respondent, all postage pre-paid.



John H. Klein

APPENDIX

Opinion of the United States Court
of Appeals for the Fourth Circuit
Dated July 24, 1981.

Jeston Holland, denied a new trial, appeals from a judgment of the district court awarding him $175 for injuries he sustained in a longshoring accident. Sea-Land Services, Inc., cross appeals, claiming that the Virginia law of contributory negligence bars any recovery by Holland. We conclude that Virginia law, rather than the maritime doctrine of comparative negligence, is applicable and reverse the judgment.

I

Holland was employed as a longshoreman by the Nacirema Operating Company and was assigned to the Sea-Land Marine Terminal in Portsmouth, Virginia. Holland's job was to drive a hustler used to transport containers, which are mounted on trailers, from storage on

land to the pier for loading aboard a vessel. As he made a 90-degree turn onto the pier from a small bridge, the hustler tipped over injuring him.

Holland received workmen's compensation from his employer, Nacirema, pursuant to the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 901. He filed this action in a state court, alleging that Sea-Land was a third party tortfeasor subject to maritime law. Sea-Land removed the case to federal district court on the basis of diversity jurisdiction.

Holland maintained in the district court that the container was not properly secured to the trailer and that Sea-Land negligently failed to inspect the trailer before allowing it to be removed through the facility. Sea-Land contended that the accident occurred

because Holland made the 90-degree turn at excessive speed.

The jury found, upon special interrogatories, that both Sea-Land and Holland were guilty of negligence which proximately caused the accident and that Holland was 75% negligent. Further, the jury found, without apportioning damages, that $700 would be a proper sum to compensate Holland for his injuries.

Sea-Land moved for judgment notwithstanding the verdict. It contended that the court could not exercise admiralty jurisdiction over the action and that Holland's recovery was barred by the Virginia doctrine of contributory negligence. The court ruled that it had admiralty jurisdiction because Holland was a longshoreman engaged in loading a vessel. Accordingly, it declined to

follow Virginia law. Instead, applying maritime principles of comparative negligence, it reduced the $700 verdict by 75%, the percentage of Holland's negligence, and awarded him $175.

II

The principal issue on appeal is the scope of federal admiralty jurisdiction conferred on district courts by 28 U.S.C. § 1333.[1] Historically, the maritime tort jurisdiction of federal courts has been determined by the

---

1. At oral argument, counsel for Holland suggested that because the container was an appurtenance of a vessel, jurisdiction is conferred under the Admiralty Extension Act, 46 U.S.C. § 740. Holland, however, did not bring an action against the vessel, and he sued Sea-Land as the operator of the terminal "and not as the owner of any particular vessel." (Brief p.9) This basis of jurisdiction was not presented to the district court and is not addressed in the parties' briefs. Accordingly, we will not consider it on appeal.

locality of the accident. As construed by the Supreme Court, maritime law governs only those torts occurring on navigable waters. It does not embrace accidents on land or on the extensions of land such as piers. Thus, in Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), the Court held that maritime law does not govern an action brought by a longshoreman, who, like Holland, was injured while driving a vehicle on a pier in the course of loading a vessel.

Notwithstanding Victory Carriers, Holland insists that maritime law should apply because he was engaged in a traditional activity of seamen at the time of the accident. To support this proposition, he relies on the Court's subsequent decision in Executive Jet Aviation, Inc., v City of Cleveland,

409 U.S. 249 (1972).

Executive Jet, however, did not abolish the locality test. Instead, it added a second prerequisite for admiralty jurisdiction, saying: "It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity." 409 U.S. at 268. An action for tort is therefore only cognizable under traditional federal admiralty jurisdiction if (1) the wrong occurred on navigable waters and (2) bore a significant relationship to a maritime activity.

Under this two-prong test, admiralty jurisdiction is not applicable to Holland's claim. While it is undisputed that Holland was engaged in maritime activity at the time of the accident,

his injury occurred on land and did not meet the locality test. Accord: Parker v. South Louisiana Contractors, Inc., 537 F.2d 113, 115 n.3 (5th Cir. 1976).

III

Holland next asserts that the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act[2] expanded admiralty jurisdiction to include injuries arising out of traditional maritime activities performed on land.

The 1972 amendment to § 2 of the Act makes compensation available for maritime related injuries which occur on land. The amendment expands the definition of "navigable waters" to include "any adjoining pier, wharf, dry dock, terminal, building way,

---

2. Act of Oct. 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251 (codified by incorporation into 33 U.S.C. §§ 901-49).

marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. § 903(a). Congressional intent in enacting this amendment was to create a uniform compensation system for longshoremen, regardless of whether the injury occurred on land or over water.[3]

Undoubtedly, Holland was engaged in maritime employment within the coverage of the 1972 Amendments to the Compensation Act. See P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). It does not follow, however, that the Act also entitles him to sue Sea-Land, a third party tortfeasor,

---

3. H. Rep. No. 92-1441, 92 Cong. 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 4698, 4707-08.

in a court of admiralty for an injury that occurred on land.

At the same time that Congress expanded the scope of workers' compensation for longshoremen, it substantially limited the right of longshoremen to recover from third parties in tort actions. Section 905(b), 33 U.S.C. § 905(b),[4] eliminates an injured long-

---

4. 33 U.S.C. § 905(b) provides in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party . . . . If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel . . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

shoreman's right to bring third party actions against vessels based on the warranty of seaworthiness. This section preserves his right under prior law to recover for third party negligence, but it does not expressly enlarge the traditional jurisdiction of admiralty over maritime torts.

Holland, nevertheless, contends that the 1972 Amendments to the Compensation Act by implication extended the scope of admiralty jurisdiction over longshoremen's tort actions against third parties. In Parker v. South Louisiana Contractors, Inc., 537 F.2d 113, 116-17 (5th Cir. 1976), the court of appeals rejected this argument for reasons which we find persuasive:

> The fact that compensation coverage was expanded to ensure that the availability of compensation benefits would no longer depend upon the "fortuitous circumstance

> of whether the injury occurred on land or over water," however, does not imply that admiralty jurisdiction has been extended to embrace noncompensation claims brought by employees against parties other than their employers.
>
> . . . .
>
> Taken as a whole, the manifest purpose of section 905 (b) is to curtail rather than expand the availability of third party actions in admiralty. With respect to third party actions for negligence, the reasonable inference is that the boundaries of maritime jurisdiction as defined under prior law (e.g., Victory Carriers) were neither expanded nor constricted by passage of the 1972 Amendments, but simply retained.

We agree that Congress did not intend that federal maritime law should apply to actions for tort brought by longshoremen injured on land. To afford Holland a maritime cause of action would intrude on an area that has been reserved for state law. In these circumstances, the Supreme Court

has repeatedly warned that we must proceed with caution. E.g., Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 272-73 (1972); Victory Carriers, Inc. v. Law, 404 U.S. 202, 211-12 (1971). Due regard for our federal system requires that we scrupulously confine federal admiralty jurisdiction to the precise limits defined by Congress. See Healy v. Ratta, 292 U.S. 263, 270 (1934).

We conclude that Holland has asserted no basis for the exercise of federal admiralty jurisdiction over his claim. The district court erred by applying the maritime doctrine of comparative negligence, rather than the Virginia law of contributory negligence. Because the jury found Holland to be contributorily negligent, he may not recover from Sea-Land for his injuries. We find nothing in Holland's assignments

of error that warrants a new trial. The judgment is reversed, and the case is remanded for entry of judgment for Sea-Land.

REVERSED and REMANDED.

Memorandum Order of United States District Court Judge Richard Kellam, dated August 29, 1980.

Plaintiff, employed as a longshoreman by Nacerima Operating Company (Nacerima), which had contracted to perform longshoring duties for Sea-Land Marine Terminal, at Portsmouth Marine Terminal, instituted this action to recover damages for injuries allegedly received while performing his duties. Plaintiff was the operator of a "hustler," used to pick up a trailer upon which a container had been loaded, and bring the trailer and container to a pier side crane where the container could be loaded onto a vessel.

Plaintiff alleges that while performing his duties on April 18, 1979, he was injured. Just before his injury, plaintiff had been instruct-

ed by his dock foreman to pick up a particular container and trailer from a holding area. Plaintiff connected his "hustler" to the particular trailer and container. As he proceeded across a small bridge toward the pier, and while making a 90° turn onto the pier, his hustler and trailer with the container thereon turned over. As a result defendant received injuries.

Tried to the jury, upon interrogatories submitted, it responded that defendant was guilty of negligence which was a proximate cause of the accident, that plaintiff was guilty of negligence which was a proximate cause of the accident, and the percentage of plaintiff's negligence was 75%. Further, the jury said that if plaintiff was entitled to recover,

that $700.00 would be a proper sum to award him to compensate him for his injuries. Each party has moved to set aside the verdict, plaintiff asking for a new trial, and defendant for a verdict in its favor.

Plaintiff complains of the failure of the Court to permit him to present evidence concerning a regulation of OSHA. He sought to show that plaintiff was an employer of defendant within the meaning of OSHA. Not only had such a contention not been pled, but the parties in the Final Pretrial Order stipulated "plaintiff was a Nacirema employee on April 18, 1979 and Nacirema was employed by Sealand

to load and unload vessels." [Final Pretrial ¶1].[1/]

Defendant says that the jury having found plaintiff guilty of negligence which was a proximate cause of the injury, he may not recover. It raises the question of whether admiralty jurisdiction exists, and maritime law applies, in which case comparative negligence would apply, or whether Virginia land based law applies, in which contributory negligence on the part of the plaintiff would bar recovery.

1/ If in fact plaintiff was an employee of defendant, he would have been covered by compensation, and would not be entitled under the Act to maintain this action.

That plaintiff was a longshoreman and engaged in loading a vessel is not in dispute. It is stipulated between the parties. Pursuant to the stipulation, it seem P.C. Pfeiffer Co., Inc. v. Ford, ____U.S.___, 100 S.Ct. 328, 335 (1979), settles the issue. There the Court said "the term 'maritime employment' refers to the nature of the worker's activities" and the Act "uses the phrase 'longshoremen or other persons engaged in longshoring operations' as one example of workers who engage in maritime employment no matter where they do their job." Further, the Court points out that maritime employment is occupational rather than geographic. It refers to status.

Prior to the 1972 amendment to the Act, a longshoreman could maintain

an action against a vessel for negligence or unseaworthiness. The 1972 amendment eliminated any cause of action based on unseaworthiness, but left the right for negligence, and it "clearly contemplated that the employee be free to sue the third-party vessel, to prove negligence and causation of the vessel's part, and to have the total damages set by the court or jury without regard to the benefits he had received or which he may be entitled to under the Act." Edmonds v. Compagnie Generale Transatlantique, ____ U.S. _____, 99 S.Ct. 2754, 2761 (1979), Congress "did not intent to change the judicially-created rule that the ship-owner can be made to pay all damages not due to the plaintiff's (long-shoreman's) own negligence." Id. at

Applying maritime law to the case, contributory negligence of the plaintiff does not bar, but only mitigates. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 408, 74 S.Ct. 202, 204 (1953) and cases there cited; Bryant v. Partenreederei-Ernest Russ, 352 F.2d 614,615 (4th Cir. 1965).

The jury determined that if plaintiff was entitled to recover then it should determine what would be a fair sum to fully compensate him for the injuries sustained. It returned a verdict of $700.00. Fortunately, plaintiff was not really injured. He complained of injury to his side and arm. Upon examination he was given mild medication and released. Though he went to another physician, the only finding was of some soreness. The medical bills were minor. From the

testimony the jury could justifiably have found the damages suffered were of no particular consequence and did not necessarily require him to lose any time from work. The "computation of total damages sustained, though modest, is not clearly erroneous." Bryant case, supra. 352 F.2d 605. The plaintiff chose to have a jury fix the damages in this case. Merely because he is disappointed at the sum fixed does not entitle him to have their finding rejected. There is nothing to indicate that the jury acted in any improper way. The jury was perfectly justified in finding the injury was minor, that plaintiff's duty to minimize his damages required he return to work and avoid any loss of time. But even with proper medical expenses and reasonable loss of

time $700.00 was not an unreasonable sum.

The jury found plaintiff guilty of 75% of the negligence which was the proximate cause of the accident and injury. There is really a minimum of evidence to show negligence on the part of the vessel. Since contributory negligence mitigates, the $700.00 must be reduced by 75%. Plaintiff is therefore entitled to recover 25% of the $700.00, or a judgment for $175.00. The Clerk is therefore directed to enter judgment for plaintiff to recover $175.00.

Richard B. Kellam,
United States District Judge,
Norfolk, Virignia
August 29, 1980.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 5 1982
ALEXANDER L. STEVAS
CLERK

Docket No. 81-779

In the Supreme Court of the United States

October Term, 1981

JESTON HOLLAND,

Petitioner

V

SEA-LAND SERVICE, INC.,

Respondent

RESPONDENT'S BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

John R. Crumpler, Jr.
SEAWELL, DALTON, HUGHES & TIMMS
900 Wainwright Building
Norfolk, Virginia 23510
804-622-5341
Attorney for Respondent
Sea-Land Service, Inc.

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES..... ii

STATEMENT OF THE CASE..... 1

ARGUMENT..... 2

POINT I: THE OSHA SAFETY REGULATIONS APPLY ONLY TO THE EMPLOYER.. 2

POINT II: THE VIRGINIA LAW OF CONTRIBUTORY NEGLIGENCE APPLIES..... 5

POINT III: THE DECISION BELOW DOES NOT CONFLICT WITH WHITE V. JOHNS-MANVILLE..... 9

CONCLUSION..... 10

TABLE OF AUTHORITIES

CASES

	Pages
Bachtel v. Mammonth Bulk Carriers Ltd., 605 F.2d 438 (9th Cir. 1979).....	3
Cargill v. U.S.A., 1977 A.M.C. 50 (E.D. Va. 1976).....	9
Davis v. Partenreederei M.S. NORMANNIA, 657 F.2d 1048 (9th Cir. 1981).....	3
Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972).....	5
Grant v. Hakko Kaiun, K.K., No. 81-1171 (11/03/81).....	1
Gould v. General Mills, Inc., 411 F. Supp. 1181 (W.D.N.Y. 1976)..	8
Heim v. City of New York, 442 F. Supp. 35 (E.D. N.Y. 1977)...	8
Holden v. Placid Oil, 473 F. Supp. 1097 (E.D.La. 1979)...	9
IT Corp. v. Superior Court, 83 Cal. App. 3d 443, 147 Cal. Rptr. 828 (1978)..	9
Johnson v. A/S Ivarans Rederei, 613 F.2d 334 (1st Cir. 1980).....	4
Kane v. Firestone, 463 F. Supp. 473 (E.D. Pa. 1978)...	9
Lemon v. Bank Lines, Ltd., 656 F.2d 110 (5th Cir. 1981).....	3
Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977).....	6

TABLE OF AUTHORITIES

CASES

Pages

P.C. Peiffer Co., Inc. v. Ford,
444 U.S. 69 (1979)..... 6

Parker v. South Louisiana Contractors, Inc.,
537 F.2d 113 (5th Cir. 1976)..... 6

THE PLYMOUTH,
3 Wall. 20, 18 L. Ed. 125 (1865)... 5

Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. _____, 101 S.Ct. 1614, 68 L. Ed 2d 1 (1981)...2,3,4,6,10

Spadola v. Viking Yacht Co.,
441 F. Supp. 798 (S.D. N.Y. 1977).. 9

SS SEATRAIN LOUISIANA v. Cal. Stevedore, 424 F. Supp. 180 (N.D. Calif. 1976).... 9

Swans v. U.S. Lines, Inc.
407 F. Supp. 388 (E.D. Pa. 1975)... 5

Victory Carriers, Inc. v. Law,
404 U.S. 202 (1971).....5,10

Wendt v. General Dynamics,
1979 A.M.C. 2897 (D.N.J. 1978)..... 9

Zapico v. Bucyrus-Erie Co.,
579 F.2d 714 (2nd Cir. 1978)..... 8

STATUTES

29 CFR §1918.1 et seq..... 2

29 CFR §1918.91..... 4

33 U.S.C. §941.....2,5,6,7,8

TREATISES

Nonvessels Right to Indemnity;
47 A.L.R. Fed. 416..... 9

STATEMENT OF THE CASE

The Respondent agrees with the Petitioner's Statement of the Case with the following clarification.

The Respondent cross-appealed to the Fourth Circuit Court of Appeals based on the failure of the district court to apply Virginia law to the question of Holland's negligence. The Fourth Circuit ruled against Holland on his appeal[1] (A-12,13) and in favor of Sea-Land[2] on the cross-appeal and remanded with instructions to enter judgment for the defendant.

---

[1]The court did not articulate its reason for ruling against Holland on this point. (A 12-13). However, the Fourth Circuit Court subsequently made it clear that it views the Regulations as being applicable only to the employer. Grant v. Hakko Kaiun, K.K., No. 81-1171 (11/03/81).

[2]Sea-Land Service Inc. is a subsidiary of R.J. Reynolds Industries, Inc. See Rule 28.1.

ARGUMENT

POINT I: THE OSHA SAFETY REGULATIONS APPLY ONLY TO THE EMPLOYER

The split in the circuits was resolved by this Court in Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. _____, 101 S.Ct. 1614, 68 L. Ed 2d 1 (1981). The holding in point is as follows:

> "As as general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. Section 41 of the Act, 33 U.S.C. §941, requires the stevedore, the longshoremen's employer, to provide a "reasonably safe" place to work and to take such safeguards with respect to equipment and working conditions as the Secretary of Labor may determine to be necessary to avoid injury to longshoremen. The ship is not the common employer of the longshoremen and owes no such statutory duty to them." This Court went on to state that:
>
> "The statutory duty of the stevedore under §941 to provide a safe place to work has been implemented by the Safety and Health Regulations for Longshoring. 29 CFR §1918.1 et seq."

There is nothing in this analysis that would impose the standards in the Regulations on the shipowner. See Lemon v. Bank Lines, Ltd., 656 F.2d 110, 115 (5th Cir. 1981). If a shipowner does not owe any "such statutory duty" because it is not the common employer of longshoremen, likewise Sea-Land, a terminal operator, not being Holland's employer (A-1), owed no such statutory duty to Holland.

Bachtel v. Mammonth Bulk Carriers Ltd., 605 F.2d 438 (9th Cir. 1979) relied on by the Petitioner was vacated by this Court for further consideration in light of Scindia, supra. 101 S.Ct. 2301 (1981).

Furthermore, the Ninth Circuit itself has retreated from Bachtel, supra, to the extent that case allowed the Regulations to impose standards on nonemployers. In Davis v. Partenreederei M.S. NORMANNIA, 657 F.2d 1048, 1053 (9th Cir. 1981) the court approved a jury charge that stated as follows:

> "The sole responsibility for compliance with the regulations of the Occupational Safety and Health Act ...in this case, rests with the Crescent Wharf and Warehouse Company, the plaintiff's employer."

The other case relied upon by Holland, Johnson v. A/S Ivarans Rederei, 613 F.2d 334 (1st Cir. 1980), is flawed because it pre-dates Scindia, supra.

Moreover, to apply the Regulations to the shipowner (or third-party) would conflict with this Court's pronouncement that the primary burden of safety is on the stevedore/employer, 101 S.Ct. at 1628, and the Court's ruling that a shipowner does not owe a nondelegable duty, 101 S.Ct. at 1623. Indeed, under some of the Regulations, for example, §1918.91 a vessel would be liable without fault for conditions created by the stevedore.

At the minimum, it would be wiser for this Court to await the circuit courts' interpretations of Scindia on this point before granting

certiorari.

POINT II: THE VIRGINIA LAW OF CONTRIBUTORY NEGLIGENCE APPLIES

The important question[3] here was settled by Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971).

Holland contends that the 1972 Amendments overrule Victory Carriers, supra,[4] and modify Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) to extend admiralty jurisdiction ashore, and thus cast aside the ancient situs test. See THE PLYMOUTH, 3 Wall. 20, 18 L. Ed. 125 (1865).

However, there is nothing in the legislative

---

[3]The question posed in the district court and in the circuit court below was whether maritime law should be applied. (A-5, A-28, 29; Order on Final Pre-Trial Conference.) To the extent Holland now argues that comparative negligence must be applied, not because maritime law applies, but because the Act sets a uniform federal standard, the Petition must be denied pursuant to Rule 16 (1)(b).

[4]Apparently only one court agrees with Holland on this point. See Swans v. U.S. Lines, Inc. 407 F. Supp. 388 (E.D. Pa. 1975).

history of the 1972 Amendments to suggest that situs is no longer a requirement for a maritime tort. The only two circuits that have explored this issue - the Fifth and the Fourth - agree that the 1972 Amendments only expand the zone for injuries compensible under the workmen compensation provisions of the Act. See A-11, and Parker v. South Louisiana Contractors, Inc., 537 F.2d 113, 116-117 (5th Cir. 1976), cert. denied 430 U.S. 906(1977). Since we are dealing here with a tort and not a compensation matter, Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977) and P.C. Peiffer Co., Inc. v. Ford, 444 U.S. 69 (1979) (relied on by the district court) are not applicable. It must be borne in mind that in 1972 Congress wanted to contract third party actions and at the same time expand workmen's compensation benefits. Scindia, supra at 1621.

Regardless, the Act does not apply to this action in the first place. While it is true

that by virtue of the 1972 Amendments the Act for the first time applies to third-party actions, Congress limited its application to actions against vessels.

> §905(b). In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the

> injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

This being an action against a non-vessel, viz a terminal operator, the Act does not apply. See Heim v. City of New York, 442 F. Supp. 35, 37-38 (E.D. N.Y. 1977).

Several courts have been called on to interpret the applicability of section 905 in a third-party context. The specific issue has been whether a nonvessel has a right of action for indemnity against an employer in an action brought against it for injuries by an "employee." It has been consistently held that §905(b) does not encompass nonvessels.

> "It is thus clear that subsection 905(b) is limited in its applicability to cases involving an action against a "vessel" for injury caused by the negligence of the "vessel." Gould v. General Mills, Inc., 411 F. Supp. 1181, 1183 (W.D.N.Y. 1976).

See Zapico v. Bucyrus-Erie Co., 579 F.2d

714, 721 (2nd Cir. 1978); Holden v. Placid Oil, 473 F. Supp. 1097, 1099 (E.D.La. 1979); Wendt v. General Dynamics, 1979 A.M.C. 2897 (D.N.J. 1978); Cargill v. U.S.A., 1977 A.M.C. 50 (E.D. Va. 1976); Contra, Kane v. Firestone 463 F. Supp. 473 (E.D. Pa. 1978); Spadola v. Viking Yacht Co., 441 F. Supp. 798 (S.D. N.Y. 1977); IT Corp. v. Superior Court, 83 Cal. App. 3d 443, 147 Cal. Rptr. 828 (1978); SS SEATRAIN LOUISIANA v. Cal. Stevedore, 424 F. Supp. 180 (N.D. Calif. 1976). See generally, 47 A.L.R. Fed. 416, Nonvessels Right to Indemnity.

POINT III: THE DECISION BELOW DOES NOT CONFLICT WITH WHITE V. JOHNS-MANSVILLE

There is no inconsistency because in White the Fourth Circuit found that the asbestos exposure occurred both ashore and on navigable waters. Here Holland's injury was all ashore. More significantly, as Judge Widener pointed out in his concurring opinion, at least 90% of the plaintiffs' exposure occurred on navigable

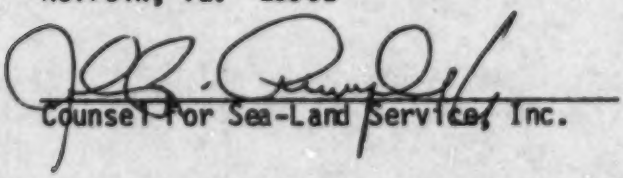
waters.

> "Given this overwhelming predominance arising in the proper maritime situs, and especially taking into account that no issue has been made of the extent of the exposure on navigable waters, I would agree that the entirety of the plaintiffs' tort claims are properly cognizable in admiralty." (Slip op. at pp. 19-20).

CONCLUSION

This Court should not grant certiorari because Santos disposed of the OSHA Regulation issue, and the 1972 Amendments did not overrule Victory Carriers.

Respectfully submitted,
John R. Crumpler, Jr.
Seawell, Dalton, Hughes, Timms
P.O. Box 119
Norfolk, Va. 23501



Counsel for Sea-Land Service, Inc.